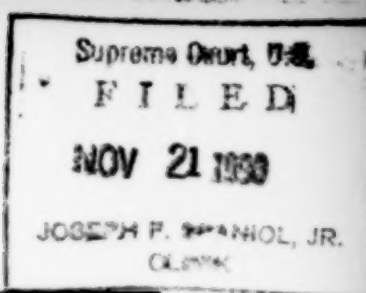


(13)  
No. 90-97



In The  
**Supreme Court Of The United States**

OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION,  
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, et al.  
*Respondents*

On Petition For A Writ Of Certiorari To The  
United States Court of Appeals For The Seventh Circuit

AMICUS CURIAE BRIEF OF  
THE FAIRFAX HOSPITAL SYSTEM

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## TABLE OF CONTENTS

	Page
I. INTEREST OF THE AMICUS CURIAE . . . . .	1
II. SUMMARY OF THE ARGUMENT . . . . .	4
III. ARGUMENT . . . . .	5
A. The Board's Rule Ignores The Congressional Admonition Against Undue Proliferation Of Bargaining Units In The Health Care Industry . . . . .	7
B. The Plain Language Of The Act Requires A Bargaining Unit Determination In Each Case . .	11
C. The Board's Rule Is Inconsistent With The Act Because It Will Deny Fairfax Hospital An Opportunity To Be Heard On The Appropriate- ness Of An All RN Bargaining Unit And The Particular Conditions Of Employment At Fair- fax Hospital . . . . .	15
D. The Board's Rule Is Arbitrary And Capricious Insofar As It Ignores The Differing Sizes, Locations And Operations Of Other Hospitals Within The Fairfax Hospital System . . . . .	21
IV. CONCLUSION . . . . .	23

## TABLE OF AUTHORITIES

Cases	Page
<i>American Hosp. Ass'n v. NLRB</i> , 718 F. Supp. 704 (N.D. Ill. 1989) . . . . .	5, 6
<i>American Hosp. Ass'n v. NLRB</i> , 899 F.2d 651 (7th Cir. 1990) . . . . .	6, 10
<i>Beth Israel Hosp. v. NLRB</i> , 437 U.S. 483 (1978) . . . . .	16
<i>Big Y. Foods v. NLRB</i> , 651 F.2d 40 (1st Cir. 1981) . . . . .	16
<i>Caminetti v. United States</i> , 242 U.S. 470 (1917) . . . . .	12
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) . . . . .	12, 13
<i>Commissioner of Internal Revenue v. Asphalt Prods. Co.</i> , 482 U.S. 117 (1987) . . . . .	12
<i>Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980) . . . . .	12
<i>Escondido Mut. Water Co. v. La Jolla Band of Mission Indians</i> , 466 U.S. 765 (1984) . . . . .	13
<i>Frederick Memorial Hosp., Inc.</i> , 254 N.L.R.B. 36 (1981) . . . . .	8, 9
<i>INS v. Cardoza Fonseca</i> , 480 U.S. 421 (1987) . . . . .	12, 14
<i>NLRB v. Frederick Memorial Hosp.</i> , 691 F.2d 191 (4th Cir. 1982) . . . . .	8, 10
<i>NLRB v. HMO Int'l/California Medical Group Health Plan, Inc.</i> , 678 F.2d 806 (9th Cir. 1982) . . . . .	10
<i>Newton-Wellesley Hosp.</i> , 250 N.L.R.B. 409 (1980) . . . . .	13

## TABLE OF AUTHORITIES (continued)

Cases	Page
<i>Otis Hosp., Inc.</i> , 219 N.L.R.B. 164 (1975) . . . . .	13
<i>St. Anthony Hosp. Sys., Inc. v. NLRB</i> , 884 F.2d 518 (10th Cir. 1989) . . . . .	10
<i>St. Francis Hosp.</i> , 271 N.L.R.B. 948 (1984) . . . . .	11, 13
<i>Southeastern Community College v. Davis</i> 442 U.S. 397 (1979) . . . . .	12
<i>Steelworkers v. Weber</i> , 443 U.S. 193 (1979) . . . . .	14, 15
<i>Trustees of the Masonic Hall &amp; Asylum Fund v. NLRB</i> , 699 F.2d 626 (2d Cir. 1983) . . . . .	10
<i>United States v. Ron Pair Enters., Inc.</i> , 489 U.S. 235 (1989) . . . . .	12
<i>United States Postal Serv.</i> , 208 N.L.R.B. 948 (1974) . . . . .	14
<i>United States v. Turkette</i> , 452 U.S. 576 (1981) . . . . .	13
<b>Statutes, Rules, &amp; Regulations</b>	
29 U.S.C. § 159(b) . . . . .	4, 11
39 U.S.C. § 1202 . . . . .	14
Notice of Proposed Rulemaking 52 Fed. Reg. 25,142 (1987) . . . . .	16
Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900 (1988) . . . . .	5, 17
Final Rule For Collective-Bargaining Units In the Health Care Industry, 54 Fed. Reg. 16,336, 29 C.F.R. § 103.30 (1989) . . . . .	1, 4

## TABLE OF AUTHORITIES (continued)

## Page

## Miscellaneous

S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051,  
93d Cong., 2d Sess. 6-7 (1974) . . . . . 8

Note, *NLRB Guidelines For Determining Health Care  
Industry Bargaining Units: Judicial Acceptance or  
Back to the Drawing Board*

78 Ky. L. J. 143 (1989) . . . . . 16

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**I. INTEREST OF THE AMICUS CURIAE**

The Fairfax Hospital System submits its brief as *amicus curiae* in support of the Petitioner, the American Hospital Association.<sup>1</sup> Petitioner in this matter challenges the legitimacy of the National Labor Relations Board's Final Rule for Collective-Bargaining Units in the Health Care Industry (hereinafter "Final Rule" or the "Rule"). 54 Fed. Reg. 16,347-16,348, 29 C.F.R. § 103.30 (1989). The Fairfax Hospital System believes it can illuminate the disruption and as-

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<sup>1</sup> All parties to this proceeding have given their written consent for the filing of this *amicus curiae* brief. The consent letters are set forth in the Appendix to this brief. (App., *infra*, 1a-4a).

sociated costs that will occur if the Seventh Circuit's decision vacating the injunction against implementation of the Rule is upheld. This *amicus curiae* brief will demonstrate the practical impact of the Board's Final Rule on acute care hospitals throughout this country.

The Fairfax Hospital System consists of four affiliated nonprofit hospitals located in the Washington, D.C. suburbs of Northern Virginia. The hospitals include (1) Fairfax Hospital, located in Falls Church, Virginia; (2) Fair Oaks Hospital, located in Fairfax, Virginia; (3) Jefferson Hospital, located in Alexandria, Virginia and (4) Mount Vernon Hospital, also located in Alexandria, Virginia. The Fairfax Hospital System employs over 7,000 health care workers. The largest of the hospitals in the System is Fairfax Hospital with over 4,600 employees. Mount Vernon Hospital has approximately 1,200 employees, whereas Fair Oaks Hospital has 850 employees. Jefferson Hospital is the smallest of the hospitals within the Fairfax Hospital System employing approximately 420 individuals. The four hospitals, despite a great disparity in size and complexity of organization, all come within the definition of "acute care" hospital as set forth in the Board's Final Rule.

All employees of the Fairfax Hospital System are currently nonunion. On January 17, 1990, however, a petition was filed in Region 5 of the National Labor Relations Board ("NLRB") by the District of Columbia Nurses Association ("DCNA"). By this petition, designated Case No. 5-RC-13331 by the NLRB, the DCNA seeks to represent a unit of approximately 1,200 registered nurses within Fairfax Hospital. The Regional Director for the NLRB's 5th Region has been prevented from taking any action on the petition because of the injunction issued by the United States District Court for the Northern District of Illinois on July 25, 1989. The United States Court of Appeals for the Seventh Circuit vacated the injunction against enforcement of the Board's Final Rule on April 11, 1990. The American Hospital Association gained a stay of that order pending the decision of this Court on the petition for a writ of certiorari. This Court granted the petition for a writ of certiorari on October 9, 1990.

If the Seventh Circuit's decision is not reversed, however, it is expected that Region 5 will move quickly to apply the Board's Final Rule to the petition filed by the DCNA and certify the proposed unit

of registered nurses as an appropriate bargaining unit without considering the special conditions of employment at Fairfax Hospital. Application of the Final Rule will preclude Fairfax Hospital from exploring the appropriateness of alternative bargaining units during the representation proceeding. The Seventh Circuit's decision to dissolve the injunction against the Board's Final Rule also raises the specter of 32 possible units within the Fairfax Hospital System, the potential for jurisdictional disputes between unions competing for membership within the System, and the potential for dramatic increases in administrative costs for the Fairfax Hospital System as a consequence of having to negotiate and administer contracts with many different unions within the Fairfax Hospital System.

The potential fragmentation of its work force is particularly alarming to Fairfax Hospital because it operates a highly integrated health care system which promotes a great degree of contact between registered nurses and other allied health professionals. The Hospital utilizes a team approach to health care and is organized along service department lines rather than artificially according to the various professions working within the facility. The Hospital's registered nurses work side-by-side with physicians, respiratory therapists, physical therapists, dieticians, occupational therapists, speech pathologists, pharmacists, social workers, medical technologists, cardiovascular technologists, radiation oncology technologists, and x-ray technologists. Many of these allied health professionals share common management with the registered nurses at the Hospital. They have similar education, training and licensure requirements. Their salaries are comparable to the registered nurses at the Hospital and they participate in common benefit plans of the Fairfax Hospital System.

The Fairfax Hospital System believes the determination of an appropriate bargaining unit for any group of organized employees at Fairfax Hospital must take into consideration the integrated nature of the Hospital's staff. Application of the Board's Final Rule, however, to the pending representation petition will preclude any adjudication of the appropriateness of an alternative bargaining unit. Fairfax Hospital will not have an opportunity to rebut the Board's conclusive presumption as to the appropriateness of an all RN unit. The Fairfax Hospital System is, thus, vitally interested in the issues presented by

this case and it supports the position of the American Hospital Association in urging reversal of the Seventh Circuit's decision.

## II. SUMMARY OF THE ARGUMENT

This case presents the important issue of whether the NLRB will be allowed to promulgate and apply a rule mandating that only eight bargaining units are appropriate within acute care hospitals regardless of differences in their size, location or operations. The Fairfax Hospital System contends that the Board's Final Rule, and its *per se* application to all representation petitions relating to acute care hospitals, including the petition for representation of registered nurses at Fairfax Hospital, is contrary to the congressional admonition contained in the legislative history of the Health Care Amendments Act of 1974. Further, the Final Rule is in conflict with Section 9(b) of the National Labor Relations Act (the "Act") which requires the Board to decide appropriate bargaining units "in each case". 29 U.S.C. § 159(b). The Board cannot exercise its rulemaking authority in a manner which is inconsistent with the Act. That is exactly the manner in which the Board has proceeded, however, by promulgating a rule which precludes individual acute care hospitals from demonstrating that the special circumstances of employment at their facilities merit consideration of alternative bargaining units than those determined to be *per se* appropriate in the Rule.

The Board's Final Rule provides for eight bargaining units within acute care hospitals. This is true regardless of the size or complexity of operations of any particular hospital. The NLRB makes clear that the eight appropriate units set forth in the Rule are the only appropriate units for bargaining "except in extraordinary circumstances". The eight units mandated by the Rule include: "(1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all [other] nonprofessional employees...." 54 Fed. Reg. 16,347-16,348, 29 C.F.R. § 103.30.

The Board's "extraordinary circumstances" exception is extremely narrow. The Board has stated that it will not consider additional evidence or arguments that a particular hospital varied from the norm, even if the variation is "highly unusual". See Second Notice of

Proposed Rulemaking ("NPR II"), 53 Fed. Reg. 33,932-33 (1988). Hospitals bear a "heavy burden" to demonstrate that extraordinary circumstances exist which make the *per se* Rule inappropriate. *Id.* at 33,933. In particular, the Board has stated that "increased functional integration of and a higher degree of work contacts between, employees as a result of the advent of a multi-competent worker, increased use of 'team' care and cross training of employees" would not be considered as a possible extraordinary circumstance. *Id.* at 33932. Differences in the sizes of various acute care hospitals, the variety of services offered by each institution and differences in staffing patterns among such facilities will also not be given weight as extraordinary circumstances meriting relief from the Rule. *Id.*

The Board's Final Rule is thus arbitrary and capricious in that its application would ignore the special circumstances of employment at Fairfax Hospital and threatens to disrupt the Hospital's team concept for delivery of quality health care at the institution. In effect, the Board has created a conclusive presumption as to the appropriate bargaining unit at Fairfax Hospital without affording the Hospital an opportunity to rebut the presumed appropriateness of a separate RN unit which is implicit in the Rule. The Hospital will be denied a meaningful opportunity to argue the appropriateness of an alternative bargaining unit in response to the petition of the DCNA. The arbitrariness of the Board's Rule is underscored by its potential application to all acute care hospitals within the Fairfax Hospital System regardless of their size or the complexity of services offered at each institution. The harm visited by the Board's Final Rule on acute care hospitals like Fairfax Hospital and on health care systems like the Fairfax Hospital System can only be avoided by reversal of the Seventh Circuit's decision and reinstatement of the district court's permanent injunction prohibiting implementation of the Rule.

## III. ARGUMENT

Petitioner in this case, the American Hospital Association, challenged the Board's Final Rule in the United States District Court for the Northern District of Illinois. On July 25, 1989, the district court issued a permanent injunction barring its enforcement. *American Hospital Ass'n v. NLRB*, 718 F. Supp. 704 (N.D. Ill. 1989). The district court held that the Board's Final Rule was in conflict with the

congressional admonition to give due consideration to preventing proliferation of bargaining units in the health care industry. The court said:

A rule which designates an absolute number of appropriate units and mandates a particular division of the workforce, especially in the health care field where employees' work environment varies widely, is not responsive to Congress' express concern. In fact, as noted above, such a rule encourages, and perhaps coerces, fragmentation of the labor force within particular health care facilities.

718 F. Supp. at 716.

Because the district court concluded that the Board's Final Rule was contrary to the congressional admonition, it did not resolve the specific issue of whether the Board's Rule was invalidated by the "in each case" requirement of Section 9(b), finding only that Section 9(b) does not entirely foreclose the Board from promulgating rules regarding appropriate bargaining units. 718 F. Supp. at 716. For the same reason, the district court did not address the American Hospital Association's claim that the Rule was arbitrary and capricious.

Respondents appealed the district court's decision to the Seventh Circuit Court of Appeals. In *American Hosp. Ass'n v. NLRB*, 899 F.2d 651 (7th Cir. 1990), the Seventh Circuit reversed the decision of the district court and vacated the injunction. 899 F.2d at 660. The court of appeals held that the "in each case" requirement of Section 9(b) did not require a case by case determination of bargaining units. The court also held that the Rule was not precluded by the congressional admonition against proliferation of bargaining units in the health care field. Finally, the court of appeals rejected the American Hospital Association's argument that the Final Rule was arbitrary and capricious because it failed to distinguish between "hospitals of different sizes and missions in different locations". *Id.* at 659.

The Seventh Circuit's decision in *American Hosp. Ass'n v. NLRB* will have a direct and immediate effect on the Fairfax Hospital System. If the decision is allowed to stand, the Board will no longer be prohibited from applying its Final Rule to representation petitions within the health care industry. The Board will undoubtedly approve

the DCNA's petition for an all RN unit at Fairfax Hospital without considering the special facts of employment at Fairfax Hospital. The Board will also not determine whether the application of the Rule would result in an unnecessary proliferation of units within Fairfax Hospital and ultimately within the Fairfax Hospital System.

Unless the NLRB's Final Rule is rejected as invalid, Fairfax Hospital will not be able to bring to light the special circumstances of employment at the Hospital. The application of the Final Rule to the pending petition of the DCNA forecloses the possibility that a unit other than an all RN unit will be considered as appropriate for bargaining at Fairfax Hospital. The result will be an unnecessary fragmentation of employees within the Hospital with registered nurses governed by different work rules than those applied to other professionals within the Hospital. The Hospital will be required to administer different wages and benefit plans for professionals working side by side. Should different unions organize separate groups of employees at Fairfax Hospital along the lines suggested by the Final Rule, the contracts dealing with all such relationships between the Hospital and the unions will likely expire at different times. Negotiations will also occur at different intervals. The Fairfax Hospital System's goal of coordinated delivery of health care will likely be thwarted by internal disputes between unions. Delivery of health care to Fairfax Hospital's patients will not be as efficient and may result in unnecessary harm to these patients.

#### **A. The Board's Rule Ignores The Congressional Admonition Against Undue Proliferation Of Bargaining Units In The Health Care Industry**

The Fairfax Hospital System, located as it is within Northern Virginia, must regulate its labor relations policies in accordance with the National Labor Relations Act as interpreted by the National Labor Relations Board and as enforced by the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit requires each bargaining unit determination of the NLRB to reflect the congressional admonition in the legislative history of the Health Care Amendments Act of 1974 that "due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry". S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93d

Cong., 2d Sess. 6-7 (1974). In *NLRB v. Frederick Memorial Hosp.*, 691 F.2d 191 (4th Cir. 1982), the NLRB sought enforcement of an order finding a unit composed of registered nurses to be appropriate at Frederick Memorial Hospital. The court of appeals rejected the Board's findings because the NLRB did not give due consideration to the issue of proliferation of bargaining units at the hospital. *Id.* at 194.

The Board's decision, *Frederick Memorial Hosp., Inc.*, 254 N.L.R.B. 36 (1981), upheld the Regional Director's determination that the registered nurses at Frederick Memorial Hospital possessed a sufficient community of interest, separate and apart from all other professionals, to justify their own unit for bargaining purposes. Finding differences in licensure and training requirements, vacation pay, overtime payments, organizational structure, and other working conditions between the registered nurses and the other professionals, the Regional Director concluded that a separate unit of nurses was appropriate. In particular, the Board emphasized the fact that the vast majority of the registered nurses at Frederick Memorial Hospital were administratively separated into a nursing division which promulgated its own work policies and procedures. The registered nurses reported to different supervisors than the other professionals at the hospital and they also lacked extensive contact with other professionals. 254 N.L.R.B. at 38.

The NLRB thus rejected the hospital's attempt to include thirty-six other health care professionals into the unit of 158 registered nurses. The NLRB also rejected, however, language in the Regional Director's decision which suggested that the RN unit sought by the union was "*per se* appropriate". The Board stated:

We do not rely on, however, any comments in the Regional Director's decision that may be taken as a conclusion that the registered nurse unit sought here was *per se* appropriate. Our conclusion on the appropriateness of the unit is based on *the particular circumstances involved here*.

*Id.* at 39 n.12 (emphasis added).

The Board's opinion in *Frederick Memorial Hosp.* discussed the fact that the Regional Director had made a detailed analysis of the working conditions of the registered nurses and the other allied profes-

sionals at the hospital before concluding that the RN unit was appropriate. The Board said:

Here, while the Regional Director issued his decision in the underlying representation case without the benefit of *Newton-Wellesley*, he did receive and consider all the evidence presented by the parties concerning the alleged appropriateness of the petitioned-for unit of registered nurses. Here, unlike the situation in *St. Francis Hospital of Linwood*, all parties at the hearing in the representation case encouraged the taking of testimony concerning the appropriateness of a registered nurse unit. With all evidence having been adduced that the parties deemed relevant, the Regional Director in his decision then concluded that the requested unit of registered nurses here was an appropriate unit for collective bargaining.

*Id.* at 37.

The *Frederick Memorial Hosp.* decision demonstrates that both the Regional Director and the Board analyzed the working conditions within the hospital in detail before concluding that the unit of registered nurses was appropriate. The Court of Appeals for the Fourth Circuit approved the detailed analysis undertaken by the Board in the underlying case. The court refused to enforce the decision, however, because neither the Regional Director nor the Board addressed the question of proliferation when considering the appropriateness of the RN unit. The court said:

The Board may not depend solely on the traditional community of interest test when making a unit determination for health care institution employees. As other courts have held, the Board must give due consideration to the congressional admonition against proliferation. Furthermore, a Board decision must clearly explain "the manner in which its unit determination ... implement[s] or reflect[s] that admonition ...."

...

A reviewing court, no less than the Board, is bound to give effect to the congressional admonition against proliferation. The court cannot in the first instance adjudicate whether certification of a unit is consistent with congressional intent. Nor can the court adequately review the Board's decision and order unless the Board clearly discloses why certification of the unit comports with the necessity of preventing proliferation.

691 F.2d at 194 (citations omitted).

The Fourth Circuit recognized in its *Frederick Memorial Hosp.* decision that a unit of registered nurses might not be appropriate in other hospitals. *Id.* In this respect, the Fourth Circuit's opinion is clearly at odds with the Seventh Circuit's decision sanctioning the Board's new *per se* approach for bargaining unit determinations. Similarly, the Fourth Circuit requires consideration in each health care unit determination of the congressional admonition against proliferation and a specific explanation of why certification of a particular unit *in each case* serves the congressional admonition against unit proliferation. This holding of the Fourth Circuit is again clearly at odds with the Seventh Circuit's decision. *See American Hosp. Ass'n v. NLRB*, 899 F.2d at 658 ("[The admonition] is cautionary rather than directive").

The Fourth Circuit's recognition of the importance of adhering to the congressional admonition against proliferation is shared by other courts of appeals. *See, e.g., Trustees of the Masonic Hall & Asylum Fund v. NLRB*, 699 F.2d 626, 632 (2d Cir. 1983); *NLRB v. HMO Int'l/California Medical Group Health Plan, Inc.*, 678 F.2d 806, 808 (9th Cir. 1982); *St. Anthony Hosp. Sys., Inc. v. NLRB*, 884 F.2d 518, 519-20 and n.3 (10th Cir. 1989). This approach to bargaining unit determinations is preferable to the abdication of responsibility for avoiding proliferation exemplified by the Seventh Circuit's treatment of the NLRB's Final Rule in this case.

## B. The Plain Language Of The Act Requires A Bargaining Unit Determination In Each Case

For over fifteen years, the NLRB has determined the appropriateness of bargaining units in acute care hospitals on a case by case basis. During numerous representation proceedings, the Board indicated its disdain for generalizations regarding appropriate bargaining units in the health care industry. *See, e.g., St. Francis Hosp.*, 271 N.L.R.B. 948, 953 (1984). Then, on the eve of an organizing drive by the DCNA at Fairfax Hospital, the NLRB decided to create a rule which makes an all RN unit *per se* appropriate in all acute care hospitals. The Board took such action even though the language of the National Labor Relations Act mandates a factual inquiry into the particular conditions of employment at each hospital before certifying a unit as appropriate for bargaining.

Section 9(b) of the National Labor Relations Act provides in pertinent part:

The Board shall decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, plant unit, or subdivision thereof....

29 U.S.C. §159(b) (emphasis added).

Despite the clear directive in Section 9(b) that the Board must determine an appropriate bargaining unit "in each case", the Board proposes to implement a rule which would make eight bargaining units *per se* appropriate in all acute care hospitals, regardless of their size or the complexity of their organization. In so doing, the Board has overstepped its rulemaking authority. Its new bargaining unit rule is directly in conflict with the plain language of the statute. The Final Rule irrebuttably presumes that certain bargaining units are appropriate without allowing adjudication of substantive issues such as the community of interests among employees at any particular facility and consideration of specific facts which might demonstrate that the Board's mandated units for bargaining are not appropriate in every case. Therefore, the Board's Final Rule must be held to be invalid.

This Court has long held that where the language of an act is plain, it must be enforced according to its terms. See *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ....the sole function of the courts is to enforce it according to its terms."). See also *Consumer Prod. Safety Comm'n v. GTE Sylvana, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive"). All that is required for giving statutory language its conclusive effect is that Congress' intent be expressed with sufficient precision in the Act. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (finding that the inquiry into the meaning of § 506(b) of the Bankruptcy Code should begin and end with the language of the statute itself); see also *INS v. Cardoza Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent"); *Commissioner of Internal Revenue v. Asphalt Prods. Co., Inc.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.").

Despite the generally accepted rule of deference to an agency's interpretation of a statute, the Board's discretion and this Court's deference to the Board's interpretation of Section 9(b) "is constrained by [this Court's] obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history". *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979). The principle of deference to an agency's construction of a statute has no application where the language of the statute is clear. As stated by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at

issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

*Id.* at 842.

As demonstrated by the American Hospital Association in its petition for a writ of certiorari, (see Petition, pp. 14, 17-18), the legislative history of the National Labor Relations Act gives no indication that the language in Section 9(b) has a meaning different from that which is clearly and specifically stated in that section. The Board should not be allowed to circumvent the plain meaning of Section 9(b) by "creating an ambiguity where none exists". See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 781 (1984) (rejecting the court of appeals' purported discovery of an ambiguity in Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e)); *United States v. Turkette*, 452 U.S. 576, 580-81 (1981) (rule of *ejusdem generis* not applicable where no uncertainty exists as to the meaning of a particular clause in a statute).

The Board's interpretation of Section 9(b) should be rejected in light of the plain language of the Act and the Board's prior conflicting interpretations of its statutory obligation to determine a bargaining unit "in each case". Despite its conclusion now that certain bargaining units are *per se* appropriate, the Board has stated many times during adjudicatory proceedings that generalizations as to proper bargaining units are not appropriate. See *Otis Hosp., Inc.*, 219 N.L.R.B. 164 (1975) ("Not all health care institutions may be exactly alike.... Between categories of employees similarly titled, there may be significant differences, not only in wages, hours, supervision, and the like, but more importantly, in functions, responsibilities, procedures, and even expertise."); *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411 (1980) (holding that the "in each case" requirement of Section 9(b) precluded a *per se* approach to bargaining unit determinations); *St. Francis Hosp.*, 271 N.L.R.B. 948, 953 n.39, 954 (1984) (finding that the diverse nature of the health care industry precludes any generalizations as to the appropriateness of particular bargaining units, the Board stated, "No unit is *per se* appropriate and ... separate representation must be justified upon each factual record....").

This Court has rejected a request for deference to an agency decision where the position of the agency has been inconsistent. See *INS v. Cardoza Fonseca*, 480 U.S. at 446 n.30 ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."). The Act's "in each case" language clearly requires consideration of particular facts in each situation to determine the appropriate bargaining unit or at least a rule regulating bargaining unit determinations that provides a meaningful opportunity for an employer in any particular case to demonstrate that the rule should not be applied. The Board's Final Rule should be rejected as contrary to the clear meaning of the statute.

The Board has construed the "in each case" language in another statute, the Postal Reorganization Act, as requiring case by case determinations of bargaining units. In *United States Postal Serv.*, 208 N.L.R.B. 948, 952-53 (1974), the Board followed its traditional community of interests analysis in considering the appropriateness of certain bargaining units involving the Postal Service. The Board was persuaded to analyze the petitions on a case by case basis by the language of the Postal Reorganization Act which states: "The National Labor Relations Board shall decide *in each case* the unit appropriate for collective bargaining in the Postal Service...." 39 U.S.C. § 1202. (emphasis added). There can be no rational reason for a departure from a case by case analysis of health care industry petitions when the language of Section 9(b) also mandates that bargaining unit determinations be made "in each case".

To paraphrase language from then Justice Rehnquist's dissenting opinion in *Steelworkers v. Weber*, 443 U.S. 193 (1979), "by going not merely *beyond*, but directly *against* [Section 9(b)'s] language and legislative history, the [Board] has sown the wind. [Health care employers and ultimately the American public] will face the impossible task of reaping the whirlwind". 443 U.S. at 255 (emphasis in original) (Rehnquist, J., dissenting). The Board's action in adopting its Final Rule "eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent" and should be invalidated. *Id.* at 222.

**C. The Board's Rule Is Inconsistent With The Act Because It Will Deny Fairfax Hospital An Opportunity To Be Heard On The Appropriateness Of An All RN Bargaining Unit And The Particular Conditions Of Employment At Fairfax Hospital**

As argued above, Section 9(b) of the Act requires the Board to make a bargaining unit determination in each case. Prior to proposing its Final Rule, the Board had always utilized a case by case adjudicatory approach in determining appropriate bargaining units. Such an approach ensures that each hospital has the opportunity to be heard on the appropriateness of a bargaining unit.

Hospitals which face statutorily imposed obligations with respect to bargaining with representatives of their employees are at least afforded the opportunity to create a factual record as to the appropriateness of alternative units prior to the Board's determination as to the appropriateness of any bargaining unit within their hospitals. Amicus curiae contends that only the Board's case by case representation procedures will provide the appropriate opportunity for health care employers to present evidence relevant to the appropriate bargaining unit question. A case by case determination affords employers the right to be heard in a meaningful manner on important bargaining unit issues and is consistent with the mandate of Section 9(b) of the Act.

In contrast, the Board's Final Rule does not afford a health care employer confronted with a petition for representation the opportunity to argue that only certain bargaining units are appropriate because of the special circumstances of employment in its facility. The Board mandates the appropriateness of certain bargaining units without affording acute care hospitals any meaningful opportunity to be heard on the bargaining unit issue. The Board's Final Rule creates a conclusive presumption that only certain units are appropriate. As stated by the Board during its rulemaking proceeding:

We have decided not to make the units only "presumptively" appropriate, because one important advantage of rulemaking is the certainty it offers.... Though an "extraordinary circumstances" exception has been in-

cluded, it is anticipated that the exception will be little used and limited to truly extraordinary situations....

NPR I, 52 Fed. Reg. 25,142 (1987).

The Board's decision to eschew a rebuttable presumption in favor of a conclusive or irrebuttable presumption creates a rule which is inconsistent with the mandate of Section 9(b) to make bargaining unit determinations "in each case." That language mandates consideration of specific facts in each case. Unless interested parties are afforded an opportunity to rebut the presumptions created by the Board's Final Rule, the Board's rulemaking is contrary to the Act and is thus invalid. See *Big Y. Foods v. NLRB*, 651 F.2d 40, 45-46 (1st Cir. 1981) (stating that Section 9(b) would invalidate a conclusive presumption because "a conclusive presumption precludes the NLRB from making a determination based upon the unique circumstances of a particular group of employees"). The Board has discretion to use rulemaking but only if it is consistent with the Act. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978); see also Note, *NLRB Guidelines For Determining Health Care Industry Bargaining Units: Judicial Acceptance or Back to the Drawing Board*, 78 Ky. L.J. 143, 158-61 (1989).

The Board's "extraordinary circumstances" exception will not provide an adequate opportunity for individual hospitals to raise issues regarding the appropriateness of any of the mandated bargaining units in their facility. As mentioned, the Board's extraordinary circumstances exception is extremely narrow. In particular, the Board will not consider increased functional integration between employees, or a high degree of work contacts between employees as an extraordinary circumstance meriting relief from the Rule. Similarly, the increased use of team care and cross-training of health care professionals which is occurring with increasing frequency in modern acute care hospitals will not be entertained by the Board as an extraordinary circumstance. Differences in the sizes of acute care hospitals, the variety of services offered by each institution and differences in staffing pattern among such facilities will also not be given weight as extraordinary circumstances warranting relief from the Rule. 53 Fed. Reg. 33,932-33 (1988).

It becomes apparent, therefore, that the Board's Rule, even with its "extraordinary circumstances" exception, ignores significant differences among acute care hospitals in the nation and effectively denies hospitals employing an integrated health care team the opportunity to demonstrate that eight different bargaining units would result in a significant disruption in the delivery of health care at their institution. Application of the Rule will prevent Fairfax Hospital from arguing the appropriateness of alternative bargaining units in response to the pending petition by the DCNA. The very factors that make Fairfax Hospital unique, i.e., the integration of health care professionals and the coordinated delivery of health care with the resulting confluence of common interests between professionals at the facility, will never be explored if the Board's new Rule is allowed to be implemented and applied to the pending petition.

The petition for an all RN unit at Fairfax Hospital will undoubtedly be approved by the Regional Director for the NLRB without a specific analysis of employment conditions at Fairfax Hospital. If the union is successful in convincing registered nurses to vote for representation, Fairfax Hospital will be faced with the dilemma of having to negotiate a collective bargaining agreement which will govern the working conditions of only a portion of the integrated team of health care professionals providing patient care services at Fairfax Hospital. The result will be a fragmentation of the work force, with some professionals working under work rules governed by the collective bargaining agreement and others working under the policies of the Fairfax Hospital System.

Fairfax Hospital has instituted a team approach to medical care within the Hospital and it has integrated the services of its professionals in implementing this approach. The Board's Final Rule would set registered nurses apart in an artificially created labor relations unit that will undoubtedly impede the coordinated delivery of health care envisioned by the Fairfax Hospital organization. Work rules developed out of the negotiations between the union and the Hospital may also conflict with the coordinated delivery of services currently utilized by the Hospital. Ultimately, if the Board's *per se* Rule is approved, the Hospital may have to deal with eight separate units of employees, all working under separate contracts with separate work rules, separate salary structures, and separate benefit plans, all of

which will be monitored and patrolled by cadres of union stewards. The Fairfax Hospital System believes that such a proliferation of units is an unnecessary consequence of the union organizing which is now occurring at Fairfax Hospital. The Fairfax Hospital System believes that its integrated organizational structure merits consideration of other possible bargaining units by which the desire for union representation, such as it may exist, can be accommodated in a coordinated and reasonable manner.

The Fairfax Hospital System urges the Court to consider whether the Board's Final Rule gives Fairfax Hospital any realistic opportunity to demonstrate that its coordinated approach to health care delivery warrants consideration of bargaining units other than the eight rigid groupings set forth in the Final Rule. For example, registered nurses at Fairfax Hospital are not set apart into a separate nursing division as was the case in the *Frederick Memorial Hosp.* decision. Registered nurses ("RNs") working at Fairfax Hospital regularly interact with other health care professionals. The organizational structure of the Hospital promotes integration between health care professionals rather than isolation of groups of professionals.

The Hospital also has mechanisms in effect for increasing the integration between professionals and the delivery of coordinated health care services to its patients. For example, delivery of emergency care is very much a team effort with nurses, physicians and x-ray technicians treating the same patient. Fairfax Hospital utilizes collaborative practice committees to enhance the effectiveness of treatment through planning and exchange of professional ideas. More complex patient care questions are the subject of Grand Rounds where interdisciplinary groups of professionals meet and discuss the more challenging patients under their care. The participants in Grand Rounds may include physicians, RNs, social workers, dieticians and other allied health professionals. During these sessions, a patient's illness is studied in detail. Nutritional needs of the patient and post-discharge concerns are also topics of review among relevant health care professionals.

This team concept for patient care is repeated in other areas of Fairfax Hospital. For example, the Hospital uses a special team to facilitate treatment of pediatric patients. The team consists of a child

life specialist, an art therapist, and a social worker who interact with RNs in Pediatrics. Creative therapists work closely with psychiatric nurses at the Hospital to enhance recovery of psychiatric patients. Physicists and dosimetrists in the Medical Physics Department provide necessary support to the Radiation Oncology Department which utilizes both RNs and radiation therapists on its staff. Physicists calibrate the equipment which the Radiation Oncology Department uses while dosimetrists measure radiation doses which the radiation therapists and RNs administer and monitor. Pharmacists are assigned to nursing units in various satellite pharmacies to increase coordination and delivery time of medicine to the Hospital's patients. RNs work with pharmacists and dieticians on nutrition support teams to assist the recovery of patients. Finally, discharge planning is also a team effort with social workers, physicians and RNs working together to coordinate the patient's return to the community.

Registered nurses at Fairfax Hospital are also present in various specialty areas where they work closely with allied professionals. For example, RNs work with radiology technologists in the Hospital's surgery center. Social workers who are assigned to patients in Cardiac Therapy interface with RNs and exercise physiologists. Physical therapists are consulted by RNs regarding the types of exercises most conducive to recovery of cardiac patients. The Infection Control Unit of Quality Resource Services is comprised of both RNs and medical technologists who serve as epidemiologists. Infection Control personnel interact with other allied health professionals at the Hospital during investigations of incidents of secondary infection at the Hospital. In addition, they provide instruction and education on infection control to coalitions of health care personnel. The Health Source Department is comprised of dieticians as well as RNs who provide community education in Lamaze techniques and nutrition. RNs and sonographers work together in the Women's and Children's Services Division. The Blood Donor Center utilizes both medical technologists and RNs in operating the Center. In point of fact, medical technologists and RNs both participate in blood drives as needed, recruit, interview, schedule and instruct blood donors, and draw blood.

Registered nurses working with other professionals in various departments share common supervision. The immediate supervisor in the department is often an allied health professional who is a

non-RN. For instance, the Director of Cardiovascular Services, a cardiovascular technologist, supervises RNs and cardiovascular technologists. The Radiation Therapy Director, a radiation therapist, supervises RNs and radiation therapists within the department. The head of the Blood Donor Center, a medical technologist, supervises RNs and medical technologists. The Director of Social Work, a social worker, supervises both RNs and social workers within that department. The Director of Radiology, a cardiovascular technologist, supervises both RNs and x-ray technologists.

The Board's Final Rule also ignores other factors at Fairfax Hospital which would undoubtedly weigh in favor of an alternative to the bargaining unit of registered nurses mandated by the Rule. For example, RNs and other allied health professionals at the hospital participate in the same benefit plans, receive comparable salaries, overtime and bonus pay. RNs and other allied health professionals all receive shift differential and weekend alternative premium. On call pay has been extended to RNs and other allied health professionals. All employees at Fairfax Hospital are also subject to identical personnel policies.

Fairfax Hospital's team approach to patient care clearly will be disrupted by the *per se* application of the Board's Final Rule. The Final Rule forces professionals working on the same hospital team into separate units for bargaining. The Rule also increases the likelihood that these professionals will be represented by different unions. The hospital's team concept could be threatened by jurisdictional disputes over which work will be performed by which union. Conflicting work rules regarding hours of work, overtime and other working conditions are likely to destroy the cohesion of the hospital's team approach to patient care. Ultimately, patient care may be impaired by the conflict between union members, thereby creating the very situation which Congress attempted to avert in drafting the Health Care Amendments Act and instructing the NLRB to avoid proliferation.

#### **D. The Board's Rule Is Arbitrary And Capricious Insofar As It Ignores The Differing Sizes, Locations And Operations Of Other Hospitals Within The Fairfax Hospital System**

The dilemma for the Fairfax Hospital System is likewise ominous if the Board's *per se* Rule is allowed to have application to all of the hospitals within the System without an individual analysis of the merits of any particular bargaining unit at each hospital. The Board's Final Rule presents the potential for 32 different bargaining units within the Fairfax Hospital System. This is true even though the hospitals vary in size from 4,600 employees at Fairfax Hospital to only 440 employees at Jefferson Hospital. Although there are 656 beds at Fairfax Hospital, there are only 120 beds at Jefferson Hospital. Fair Oaks Hospital is also a smaller facility with only 160 beds. Fairfax Hospital employs over 1400 registered nurses whereas Jefferson Hospital has 136 registered nurses. Other allied health professionals at Fairfax Hospital number approximately 590 while there are approximately 66 allied health professionals at Jefferson Hospital.

Patient care services vary from hospital to hospital. The range of services offered obviously is much more complex and varied at Fairfax Hospital than can be achieved at Jefferson Hospital. The operating budget at Fairfax Hospital is almost ten times greater than that of Jefferson Hospital. Even assuming an all RN unit is appropriate at Fairfax Hospital, a similar fragmentation of the professional work force at Jefferson Hospital would not necessarily be appropriate. The Board's Rule mandates such fragmentation, nevertheless.

The same mechanisms that are in effect at Fairfax Hospital for integrating health care professionals are present at the smaller hospitals within the Fairfax Hospital System. These hospitals also utilize team concepts for delivery of health care. For example, within the Cardiology Department at Jefferson Hospital, RNs perform many of the same duties as cardiovascular technicians. Mount Vernon Hospital employs a "Surgical Suite" which uses an interdisciplinary approach to surgery with RNs, surgical technicians, physicians, and physicians' assistants working together to deliver quality health care. Laboratory technicians, radiology technicians, RNs, social workers and physicians work together in Emergency Services at Mount Vernon

Hospital. Certain nursing units at Mount Vernon Hospital work closely with physical therapists, occupational therapists, and speech pathologists from Physical Medicine and Rehabilitation Services to coordinate treatment of patients referred to the Physical, Medicine and Rehabilitation Department.

Registered nurses and allied health professionals also work in service departments where they share common supervision. The Assistant Administrator for Nursing supervises respiratory therapists at Jefferson Hospital. Diabetes Management at Jefferson Hospital is overseen by an RN whose duties include coordinating the activities of clinical dietitians. The Director of Radiology at Fair Oaks Hospital supervises RNs and radiology technicians within the Radiology Department. The Cardiac Catheterization Laboratory at Fair Oaks Hospital utilizes RNs and cardiovascular technicians. The laboratory's supervisor is a cardiovascular technician who reports to a Patient Care Director who is a registered nurse.

The Fairfax Hospital System applies the same benefit plans, personnel policies and salary scales to all employees in the System. See App., pp. 5a-7a. All professionals are analyzed using a Job Analysis Questionnaire and each is then assigned to a grade within a designated range. This salary analysis procedure is done at each of the hospitals in the System and the results are coordinated and administered by personnel at System headquarters. The result is a uniform salary structure which produces comparable pay within the System for all professionals and common interests in wages and benefits between RNs and other allied health professionals at each hospital. The cost to the Fairfax Hospital System of restructuring its benefit plans, its salary scales, and its personnel policies to accommodate 32 different bargaining units would be enormous.

The Board's Final Rule is arbitrary and capricious in that it fails to recognize the differences between the various hospitals within the Fairfax Hospital System and because it prevents any particular hospital from arguing the reasonableness of a lesser number of bargaining units than that which is mandated by the Board's Final Rule. The potential problems and disruption which would likely be experienced within the Fairfax Hospital System will reoccur within other hospital systems unless the Court overturns the Seventh Circuit's decision and

reinstates the injunction ordered by the district court. A decision overturning the Board's Final Rule is needed now before costs and disruption begin escalating for the Fairfax Hospital System and other health care institutions in this country.

#### IV. CONCLUSION

For all the foregoing reasons and for the reasons stated in the brief of the American Hospital Association, the decision of the Seventh Circuit should be reversed.

Respectfully submitted,

By: \_\_\_\_\_

JOHN G. KRUCHKO\*  
PAUL M. LUSKY  
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(703) 734-0554

Attorneys for Amicus Curiae  
The Fairfax Hospital System

\* Counsel of Record

APPENDIX

1a

**Mayer, Brown and Platt**

October 17, 1990

Paul M. Lusky, Esq.  
Kruchko & Fries  
7929 Westpark Drive, Suite 202  
McLean, Virginia 22102

*Re: American Hospital Association v. NLRB*

Dear Mr. Lusky:

On behalf of the American Hospital Association, I hereby consent to the filing of a brief *amicus curiae* by the Fairfax Hospital System in the above-referenced case.

Sincerely,

/s/ James D. Holzhauer

2a

**U.S. Department of Justice  
Office of the Solicitor General**

October 16, 1990

Paul M. Lusky  
Counsel  
Kruchko & Fries  
Counsels at Law  
Suite 202  
7929 Westpark Drive  
McLean, Virginia 22102

Re: *American Hospital Association v. NLRB*  
No. 90-97

Dear Mr. Lusky:

In response to your letter of October 11, 1990, I hereby consent to the filing in the above-captioned case of an *amicus curiae* brief on behalf of the Fairfax Hospital System.

Sincerely,

/s/ Kenneth W. Starr  
Solicitor General

3a

**Dickstein, Shapiro and Morin**

October 23, 1990

Paul M. Lusky, Esquire  
Kruchko & Fries  
7929 Westpark Drive  
Suite 202  
McLean, Virginia 22102

RE: *American Hospital Association v. N.L.R.B.*, et al.  
No. 90-97

Dear Mr. Lusky:

The American Nurses' Association consents to your filing of an *amicus curiae* brief in the above-referenced matter on behalf of Fairfax Hospital System.

Sincerely,

/s/ Woody N. Peterson

4a

**American Federation of Labor and  
Congress of Industrial Organizations**

October 16, 1990

Paul M. Lusky, Esq.  
Kruchko & Fries  
7929 Westpark Drive  
McLean, Virginia 22102

Re: *American Hospital Association v. NLRB, et al.*  
(Supreme Court No. 90-97)

Dear Mr. Lusky:

The American Federation of Labor and Congress of Industrial Organizations hereby consents to the timely filing of an *amicus curiae* brief in support of the petitioner in the above-referenced matter on behalf of the Fairfax Hospital System.

Sincerely yours,

/s/ David Silberman

5a

**EMPLOYEE BENEFIT SUMMARY**

EMPLOYEE BENEFIT	APPLICABLE TO	
	Regular Full-Time	Regular Part-Time
<b>HEALTH &amp; WELFARE</b>		
<b>SHARED*CARE:</b>		
FREE to full-time employee .....	Yes*	Yes*
Kaiser-Permanente Health Plan (HMO) .....	Yes*	Yes*
Group Health Association (HMO) .....	Yes*	Yes*
<b>Dental Insurance:</b>		
FREE to full-time employee .....	Yes*	Yes*
<b>Life Insurance with AD&amp;D:</b>		
FREE to employee .....	Yes	Yes*
<b>Supplemental Life Insurance for Employees and/or Dependents:</b>		
Purchased thru payroll deduction .....	Yes	Yes**
<b>Disability Income Insurance:</b>		
FREE to employee	Yes	No
<b>Retirement Program: FREE to employee working 1000 hours or more/yr .....</b>		
Yes	Yes	Yes
<b>Social Security (employee contributions matched) .....</b>		
Yes	Yes	Yes
<b>Worker's Compensation .....</b>	Yes	Yes
<b>Unemployment Insurance .....</b>	Yes	Yes
<b>Employee Health Program .....</b>	Yes	Yes

\*For full-time employees some benefits may require contributions such as family plan for hospitalization and dental insurance, extra cost for HMO or IPA plans and optional additional life insurance. Part-time employees (at least 20 hours per week) pay full premium but at group rates.

\*\*Applicable to part-time employees budgeted 16 or more hours per week.

**EMPLOYEE BENEFIT SUMMARY (continued)****PAID TIME OFF (Employees budgeted to work 15 hours or less per week are not eligible)**

Paid Vacations: 10 days increasing to 20 days over 10 years .....	Yes	Yes**
Paid Sick Leave: up to 12 days .....	Yes	Yes**
Paid Holidays: 7 days .....	Yes	Yes**
Paid Personal Days Off: 3 days .....	Yes	Yes**
Paid Time Off Upon Death of Family Member: up to 3 days .....	Yes	Yes

**MISCELLANEOUS SERVICES****CONCERN: Employee**

Assistance Program .....	Yes	Yes
Tuition Assistance Program .....	Yes	Yes**
Shift Differential & Weekend Differential Pmts .....	Yes	Yes
Grievance Procedure .....	Yes	Yes
Employee Credit Union .....	Yes	Yes
Employee Recreation Programs .....	Yes	Yes
FREE Employee Parking .....	Yes	Yes
FREE Uniforms & Laundry (certain departments) .....	Yes	Yes
Awards for Length of Service .....	Yes	Yes
Pharmacy Purchases (prescriptions) .....	Yes	Yes
Thanksgiving & Christmas Dinners: FREE to employee .....	Yes	Yes
Cafeteria: Lower Prices .....	Yes	Yes
Group Tax Shelter Annuity Program .....	Yes	Yes
Purchase U.S. Savings Bonds by Payroll Deduction .....	Yes	Yes
Pre-Retirement Counseling .....	Yes	Yes

\*\*Applicable to part-time employees budgeted 16 or more hours per week.

**FAIRFAX HOSPITAL SYSTEM SALARY RANGES**

Nursing range .....	\$13.70 - \$21.00
PTs, OTs, SPs .....	\$12.85 - \$19.66
Respiratory therapists .....	\$12.84 - \$19.63
Advanced pulmonary tech .....	\$12.84 - \$19.63
Ultrasonographer .....	\$12.70 - \$19.47
Special procedures tech .....	\$12.70 - \$19.43
Radiation Oncology tech .....	\$12.44 - \$19.04
Pharmacists .....	\$12.14 - \$24.75
Social workers .....	\$12.14 - \$18.57
Nuclear medical techs .....	\$11.47 - \$17.59
Dieticians .....	\$11.29 - \$17.27
Medical techs .....	\$10.86 - \$16.67